



**BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals**

In the Matter of the 1981 Chevrolet, VIN
1G1AY8761BS404768.

Case Nos. 97-H-1014
97-H-1026

FINAL DECISION

Allstate Indemnity Company applied to the Department of Transportation for a title and registration to the 1981 Chevrolet Corvette which is the subject of this hearing. The Department refused to issue a title or registration to Allstate Indemnity Company for the subject vehicle. By letter dated January 6, 1997, Allstate Indemnity Company requested a hearing to review the Department's decision. (Docket No. 97-H-1014)

Dennis and June Scherff also applied to the Department for a title and registration for the subject vehicle. By letter dated December 10, 1996, the Department refused to issue a title or registration to them. By letter dated March 4, 1997, Dennis Scherff requested a hearing to review the Department's decision. (Docket No. 97-H-1026)

Pursuant to due notice a combined hearing was held on March 24, 1997, in Madison, Wisconsin, before Mark J. Kaiser, Administrative Law Judge.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

Allstate Indemnity Company, by
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Madison, WI 53703-3233

Dennis and June Scherff, by
Attorney Thomas P. Herzog
Crossroads Corporate Center
20800 Swenson Drive, Suite 425
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Wisconsin Department of Transportation, by
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The Administrative Law Judge issued a proposed decision on April 3, 1997. No comments on the proposed decision were received. Except for the correction of typographical errors, the proposed decision is adopted as the final decision in this matter.

Findings of Fact

The Administrator finds:

1. On April 20, 1996, Dennis Scherff contracted to purchase a 1981 Chevrolet Corvette, VIN 1G1AY8761BS404768, from Capitol Corvette. Pursuant to the purchase contract, Mr. Scherff traded in a 1990 Dodge Spirit plus paid \$8308.89 including tax, license and title fees for the 1981 Chevrolet Corvette. Dennis Scherff took possession of the Corvette and retained possession of the vehicle as of the date of the hearing in this matter.
2. In April, 1996, Capitol Corvette was a motor vehicle dealer conducting business at 5400 King James Way, Madison, Wisconsin, 53719. Capitol Corvette was in the business of selling Corvettes. Capitol Corvette was a sole proprietorship and held a motor vehicle dealer license number 1047. David C. Larson was the owner and sole proprietor of Capitol Corvette. On December 9, 1996, the Division of Hearings and Appeals issued an order revoking Capitol Corvette's motor vehicle dealer license (Docket Nos. 96-H-986 and 96-H-993).
3. The Division of Motor Vehicles of the Department of Transportation (DMV) is part of an agency of the State of Wisconsin and is authorized under sec. 218.01, Stats., to license, inspect, and regulate motor vehicle dealers in Wisconsin. DMV also has the authority under chapters 341 and 342, Stats., to issue titles and registration for motor vehicles in Wisconsin.
4. The 1981 Chevrolet Corvette purchased by Dennis Scherff was owned by Michelle A. Heuter. Ms. Heuter had entered into a consignment agreement with Capitol Corvette to sell the vehicle. Capitol Corvette failed to pay Ms. Heuter the purchase price for this vehicle, in violation of the terms of the consignment agreement.
5. Ms. Heuter filed a theft claim with her insurance company, Allstate Indemnity Company, for the value of the vehicle. Allstate Indemnity Company paid Ms. Heuter \$9,725.00 on her claim and Ms. Heuter transferred her interest in the vehicle for Allstate Indemnity Company.
6. By application dated April 27, 1996, Dennis H. Scherff and June M. Scherff applied to the DMV for Wisconsin title and registration for the subject vehicle. Allstate Indemnity Company by virtue of its agreement with Michelle Heuter also asserts an ownership interest in the subject vehicle. Because of the conflicting ownership claims, the DMV refused to issue a title or registration to Dennis and June Scherff or Allstate Indemnity Company.

7. When Dennis and June Scherff purchased the subject vehicle from Capitol Corvette, they were not aware that it was owned by Michelle Heuter, and that the Corvette was sold on consignment by Capitol Corvette for Ms. Heuter. Dennis Scherff purchased the Corvette at Capitol Corvette's business premises, and he believed that Capitol Corvette owned this vehicle and had the authority to sell it. Capitol Corvette did not inform the Scherffs that the Corvette was owned by Ms. Heuter.
8. Dennis Scherff has never worked for an automobile dealer, nor has he worked in the automotive industry. Prior to this transaction, neither Dennis nor June Scherff had any financial dealings with Capitol Corvette or David Larson.
9. Dennis Scherff purchased the subject motor vehicle in good faith and without knowledge that the sale was in violation of the ownership right of Michelle Heuter. Dennis Scherff is a buyer in the ordinary course of business of the subject motor vehicle

Discussion

Dennis and June Scherff and Allstate Indemnity Company have applied to the DMV for a certificate of title and registration for the subject motor vehicle. Pursuant to secs. 342.11(1) and 342.12(2), Stats., the DMV refused to issue a title or registration to the Scherffs for the subject motor vehicle.¹

The Wisconsin motor vehicle code is silent with respect to issuance of a title and registration in this situation. The transaction is regulated by the Uniform Commercial code. Pursuant to the sec. 402.403(2), Stats., "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives the merchant power to transfer all rights of the entruster to a buyer in ordinary course of business." In the instant matter, Michelle

¹ Sec. 342.11(1), Stats., provides in relevant part:

The department shall refuse issuance of a certificate of title...for any of the following reasons:

- (1) The department has reasonable grounds to believe that:
 - (a) The person alleged to be the owner of the vehicle is not the owner.
 - (b) The application contains a false or fraudulent statement.

Sec. 342.12(2), Stats., provides in relevant part:

- (2) If the department is not satisfied as to the ownership of the vehicle or that there are no undisclosed security interests in it, the department, subject to sub. (3), shall either
 - (a) Withhold issuance of a certificate of title until the applicant presents documents reasonable sufficient to satisfy the department as to the applicant's ownership of the vehicle and that there are no undisclosed security interests in it; or
 - (b) Issue a distinctive certificate of title pursuant to sec. 342.10(4) or 342.283.

Heuter entrusted the subject motor vehicle to Capitol Corvette for the purpose of selling the vehicle. Accordingly, Capitol Corvette had the power to transfer ownership of the vehicle to a buyer.

Capitol Corvette has authority to transfer interest in the vehicle even if the consignor has retained title. In general, the interest of a consignor are not protected unless the consignor complies with one of the three alternatives set forth at sec. 402.326(3), Stats., relating to informing prospective creditors of the consignee of a potential security interest.² Allstate Indemnity Company has not alleged that Michelle Heuter, its insured, complied with the provisions of sec. 402.326(3), Stats.

Dennis Scherff purchased the vehicle from Capitol Corvette. He was unaware that Capitol Corvette was selling the vehicle on consignment. Even if Mr. Scherff had been aware that the vehicle was being sold on consignment, there is no evidence that he should have suspected that Capitol Corvette did not intend to use the proceeds of this sale to pay the consignor or the sale was fraudulent in any manner.

The Scherffs have the burden to prove that they are buyers in the ordinary course of business. The phrase "buyer in the ordinary course of business" is defined at sec. 402.201(9), Stats. Sec. 401.201(9), Stats., provides in relevant part that: "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to the person is in violation of the ownership rights or security interest of a 3rd party in the goods buys in ordinary course from a person in the business of selling goods of that kind . . .'. Based on the stipulation of facts, it appears that the Scherffs are good faith purchasers who purchased the vehicle without knowledge that the sale was in violation of the ownership rights of Michelle Heuter. Dennis Scherff purchased the vehicle from Capitol Corvette, a licensed motor vehicle dealer, which at the time of the purchase was a company in the business of selling used motor vehicles.

² Sec. 402.326(3), Stats., provides in relevant part:

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which the person deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. This subsection is applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery:

- (a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or
- (b) Establishes that the person conducting the business is generally known by that person's creditors to be substantially engaged in selling the goods of others; or
- (c) Complies with the filing provisions of ch. 409

Conclusions of Law

The Administrator concludes:

1. Pursuant to sec. 402.403(2), Stats., Capitol Corvette had the power to transfer all of Michelle Heuter's ownership rights in the subject motor vehicle to a buyer in the ordinary course of business.
2. Dennis Scherff is a buyer in the ordinary course of business of the subject motor vehicle. Pursuant to sec. 402.403, Stats., Dennis and June Scherff have acquired title and ownership of the subject motor vehicle.
3. Pursuant to secs. 346.26 and 227.43(1)(bg), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

Order

The Administrator orders:

The Division of Motor Vehicles of the Department of Transportation shall issue a motor vehicle title and registration to Dennis and June Scherff for the 1981 Chevrolet Corvette, VIN 1G1AY8761BS404768, which is the subject of this matter.

Dated at Madison, Wisconsin on May 2, 1997.

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By: 

David H. Schwarz
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